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No. 93-1935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION,

Petitioner,

V.

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The National Union Fire Insurance Company of Pittsburgh, PA ("National Union") is one of the largest underwriters in the United States of insurance covering certain liabilities arising from claims under the Employee Retirement Income Security Act of 1974 ("ERISA"). National Union has issued a policy which covers certain ERISA-related liabilities of petitioner Curtiss-Wright Corporation ("Curtiss-Wright"). In addition, National Union has issued similar policies to well

over a thousand other employee benefit plan sponsors which may be exposed to liability if the decision below is not reversed. National Union therefore has a substantial interest in the outcome of this case. Moreover, the uncertainty engendered by the decision below as to the validity of current terms of employee benefit plans makes it more difficult for National Union to underwrite policies of insurance that cover ERISA-related liabilities. Unless the decision below is reversed, this difficulty will either increase the cost or restrict the availability of such insurance, thus harming the companies that sponsor employee benefit plans and making it less likely that they will continue to provide such plans.[1]

SUMMARY OF ARGUMENT

The Court of Appeals held that Curtiss-Wright had expressly reserved its power to make amendments to its employee welfare benefit plan. The court also held, however, that a plan amendment eliminating plaintiffs' retiree health benefits was invalid because, in the court's view, the plan lacked an amendment procedure which satisfied § 402(b)(3) of ERISA, 29 U.S.C. § 1102(b)(3).

Section 402(b)(3) does not require the detailed amendment procedure envisioned by the Court of Appeals. To the contrary, all § 402(b)(3) requires is that plan sponsors which want to maintain their power to amend plans reserve the

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[1] This brief is filed with the consent of the parties. Their letters of consent have been filed with the Clerk of the Court with this brief.

power to do so, thus alerting plan participants that future amendments could modify their current benefits. The statutory purpose identified by the Court of Appeals of ensuring that all parties involved with an employee benefit plan be able to determine the plan's terms with certainty is already amply served by § 402(a)'s requirement that the plan be maintained in writing and is frustrated by the court's holding invalidating the written terms of an amended plan.

Even if the Court of Appeals were correct in its reading of § 402(b)(3), the remedy it upheld -- an award of the very benefits intended to be eliminated by the plan amendment -- is unwarranted. Regardless of how the perceived violation of § 402(b)(3) is characterized, it did not, by itself, detrimentally affect participants whose benefits would still have been eliminated even if the plan had fully complied with the court's reading of § 402(b)(3). The appropriate result when a procedural violation relating to an amendment has occurred is, as trust law principles provide, to give effect to the amendment where, as here, the sponsor's intent to amend has been clearly manifested and the amendment is not prohibited by the plan instrument.

Because the Court of Appeals erred both in finding a violation of § 402(b)(3) and in awarding a substantive remedy for such a violation, its judgment to that effect should be reversed.

ARGUMENT

I. Curtiss-Wright Did Not Violate § 402(b)(3) of ERISA

This litigation arose from Curtiss-Wright's decision, announced in November 1983, to close a plant in Wood-Ridge, New Jersey. (Pet. App. 3a.) Consistent with the terms of its health benefit plan for retirees, as set out in a 1983 Summary Plan Description ("SPD"), health benefits for non-bargaining unit employees who had retired from the Wood-Ridge plant were discontinued once the plant closed. (Pet. App. 4a-6a.) This lawsuit followed.

The District Court held that the 1983 SPD constituted an amendment to Curtiss-Wright's plan (Pet. App. 36a) and this issue was not presented to the Court of Appeals. Although the Court of Appeals held that Curtiss-Wright had reserved the power to make such an amendment and it was undisputed that this amendment was in writing, the court held that the amendment was unenforceable because the Curtiss-Wright plan lacked an amendment procedure as required by § 402 (b)(3) of ERISA. (Pet. App. 10a, 13a-14a.)

Section 402(b)(3) states:

> (b) Every employee benefit plan shall . . .
>
> > (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan.

The Court of Appeals held that Curtiss-Wright had expressly reserved its power to amend the plan by stating in various documents, including the Constitution that served as an umbrella document for all of Curtiss-Wright's benefit plans,

that "the Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." (Pet. App. 4a.) The court held, however, that the Curtiss-Wright plan lacked the amendment procedure required by § 402(b)(3), thus rendering the 1983 amendment unenforceable. (Pet. App. 11a.) The court concluded that the reservation clause in the Constitution satisfied neither of the two requirements of § 402(b)(3), *i.e.*, that the plan provide an amendment procedure and a procedure for identifying the persons with authority to make amendments. (Pet. App. 7a-8a.)

As to the second of these requirements, the court clearly erred by holding that identification of the "Company" was not a sufficient identification of "persons" with amendment authority. (Pet. App. 8a.) Section 3(9) of ERISA, 29 U.S.C. § 1002(9), expressly defines the term "person" to include a "corporation" and other entities in addition to an "individual." Thus, Curtiss-Wright was not, as the court suggested, required by § 402(b)(3) to identify the actual "individuals or bodies within the Company" (Pet. App. at 8a) who would make the amendment decision for the "Company."[2] Its designation of the "Company" was sufficient to comply with the statute.

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[2] In a variety of other contexts, courts have recognized what § 3(9)'s language makes plain, *i.e.*, that a "person" need not be an "individual." *See, e.g.*, *Confer v. Custom Eng'g Co.*, 952 F.2d 34, 36 (3d Cir. 1991) (corporation is a "person" for purposes of ERISA under § 3(9)); *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 960 (1st Cir. 1989); *Scarbrough v. Perez*, 870 F.2d 1079, 1082 (6th Cir. 1989).

As to the first requirement of § 402(b)(3) -- that the plan "provide a procedure for amending such plan" -- the reservation of amendment power in the Constitution was also sufficient. Placing the amendment power in the "Company" by itself creates an amendment procedure, *i.e.*, that the "Company" would take whatever corporate actions were necessary in order to exercise its amendment authority. While an amendment procedure may spell out those steps if the plan's sponsor so desires, nothing in ERISA suggests a reason why § 402(b)(3) must or should be read to require such detail.

A procedure is "[a] manner of proceeding; a way of performing or effecting something." *American Heritage Dictionary of the English Language* 1444 (3d ed. 1992). Without question, Curtiss-Wright had a "procedure" in this sense for amending its plan. Curtiss-Wright "proceeded" to amend its plan by having the amendment approved by company officials and inserted in the written document governing the plan. This procedure was based on and bounded by two different sets of legal requirements: the state corporate law requirement that the "Company" act in an authorized manner sufficient to bind the corporation and ERISA's requirement, contained in § 402(a), that amended plan terms, like all other plan terms, be incorporated in the written instrument pursuant to which the plan is established and maintained. By authorizing the "Company" to amend the plan, the plan Constitution necessarily required that the Company act in an authorized fashion and effect its amendments in writing.

The Court of Appeals rejected this construction of § 402(b)(3) on the grounds that it would render the "require-

ments of § 402(b)(3) essentially meaningless."[3] (Pet. App. 8a.) That conclusion, however, rested entirely on the court's assumption that "[a] primary purpose of § 402(b)(3) is to ensure that all interested parties will know how a plan may be altered. . . . Only if they know this information will they be able to determine with certainty at any given time exactly what the plan provides." *Id.*

In divining this "primary purpose" of § 402(b)(3), the court cited to no authority in the statute, legislative history, or elsewhere evidencing such a purpose. Obviously, the written plan requirement of § 402(a) serves the statutory purpose associated by the court with § 402(b)(3) of letting "all interested parties . . . determine with certainty at any given time exactly what the plan provides." (*See* Pet. App. 8a.) Indeed, the court's phrasing of this statutory purpose tracks closely the legislative history's description of § 402(a), not § 402(b)(3), as permitting an employee to "determine exactly

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[3] The court's conclusion dealt inconsistently with the two requirements of § 402(b)(3). As to the second of these requirements -- that the plan "provide a procedure . . . for identifying the persons who have authority to amend the plan" -- the court apparently concluded that it would have been sufficient to specifically identify the persons with amendment authority without also setting forth separately a written "procedure" for such identification. As to the first requirement, however, the court found it insufficient that Curtiss-Wright actually engaged in a process that produced a written amendment and required that this process be described in a written "procedure".

what his rights and obligations are under the plan."[4] Recognizing the importance of certainty to all "interested parties" -- i.e., to plan sponsors and administrators as well as plan participants and beneficiaries -- the lower courts have consistently held that plan benefit entitlements must be determined solely under the terms of the plan.[5]

The lower court's interpretation of § 402(b)(3), however, disserves, not advances, this statutory purpose of certainty as it casts doubt on the reliability of the written plan instrument. Rather than looking solely at the plan's provisions, interested parties would have to investigate further to determine which provisions had resulted from amendments and whether each amendment had been promulgated in compliance with the plan's amendment procedure. As to any amendments

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[4] H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 297 (1973) (hereinafter "Conference Report"), *reprinted in* 3 Senate Subcomm. on Labor, Legislative History of ERISA 4518, 4564 (Comm. Print 1976) (hereinafter "Legislative History") *and in* 1974 U.S. Code Cong. & Admin. News 5038, 5077-78.

[5] *See, e.g., Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1295-97 (5th Cir. 1989); *Central States, Southeast & Southwest Areas Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1149 (7th Cir. 1989); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986). The sole exception recognized by some courts is where a participant has reasonably relied to his or her detriment on some authoritative statement not contained in the written plan. *See, e.g., Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163-64 (6th Cir. 1988) (affirmative misstatements made by corporate sponsor and relied upon by participants may entitle participants to those benefits). This Court need not address any of these grounds, which are not at issue before the Court.

revealed to be the product of a defective procedure, the question would then have to be resolved whether the amendment was, in the phrase used by the court below, "advantageous to the sponsor's interest" (Pet. App. 11a, n.5), and thus unenforceable, or whether it fell into some other category that perhaps rendered it enforceable despite its procedural deficiency.[6] Thus, the court's reading of § 402(b)(3) actually undermines the certainty purpose embodied in § 402(a).

The importance of § 402(a)'s requirement that a plan be maintained in writing is confirmed by ERISA's provisions requiring disclosure to plan participants. While Curtiss-Wright followed the not uncommon practice of letting a single document do double duty as both an SPD and a plan document, many plans publish SPDs that are separate from, and merely summarize, the more detailed terms of the plan instrument created in compliance with § 402(a).[7] Only the

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[6] The Court of Appeals' attempt to limit its holding to amendments "advantageous to the sponsor's interest" has no basis in the statute and is itself meaningless. All plan amendments, even ones that increase benefits, are presumably "advantageous" to the sponsor, or the sponsor would not make the amendment. Moreover, it is common for plan amendments both to simultaneously improve and restrict benefits and to affect different participants differently. For example, an amendment implementing a preferred provider network may provide greater benefits to participants who use network providers while increasing deductibles and copayments for other participants who choose not to use the network.

[7] Although §§ 102(a)(1) and (b) contemplate that the SPD will be a readable summary of the plan's provisions, nothing in ERISA precludes a plan from combining the plan instrument and SPD into a single document.

SPD, not a separate plan document, is required to be distributed to participants. *See* § 104(b)(1), 29 U.S.C. § 1024(b)(1). Moreover, although plan administrators are required to distribute updated SPDs every five years to reflect plan amendments and summaries of material modification ("SMMs") more frequently to reflect material plan changes (*see* §§ 102(a)(1), 104(b)(1)), the required distribution need not be made simultaneously with the plan modifications. To the contrary, balancing the participants' need for disclosure with the cost burdens on plan sponsors, Congress enacted § 104 of ERISA which requires only that SMMs be distributed within 210 days after the end of the plan year in which the modification was made. *See* § 104(b)(1).[8] Thus, to take the extreme case, a plan amendment made effective at the beginning of one plan year need not be disclosed in an SMM until nineteen months later; even for a year-end amendment, a seven-month delay could ensue.

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[8] Because ERISA does not require employers to provide *any* benefit plans, Congress balanced its desire to regulate plans extensively against the danger that increased regulation would deter employers from creating plans in the first place. Although ERISA was clearly "designed to promote the interests of employees and their beneficiaries in employee benefit plans," *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983), the statute was also drafted to "minimize[ ]" the "adverse impact" of "cost increases" imposed on employers by the tougher regulation. H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 1, *reprinted in* 2 Legislative History 2348 *and in* 1974 U.S. Code Cong. & Admin. News 4639. Thus, Congress analyzed "all of the provisions in [ERISA] . . . on the basis of their projected costs in relation to the anticipated benefit to the employee participant." *Id.* at 4639-40.

Most employers, of course, do not operate their businesses by keeping employees in the dark about significant changes affecting their benefits. ERISA's provisions, in any event, protect against such conduct. The statutory provisions which primarily ensure that participants have access to contemporaneous information about plan terms without any gap resulting from delayed distribution of an SPD or SMM are § 104(b)(2) and § 402(a). Section 104(b)(2) requires that the plan administrator make available for inspection by participants certain specific documents, including "instruments under which the plan was established or is operated."[9] Because § 402(a) requires that the plan terms be reflected in a written instrument, those terms are available to participants for contemporaneous inspection under § 104(b)(2).[10] The purpose identified by the Court of Appeals as "a primary purpose" of § 402(b)(3) is instead fully served by the combination of § 402(a) and § 104(b)(2). Or, as the legislative history of § 402(a) phrases it: "A written plan is to be

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[9] In addition, § 104(b)(4) requires a plan administrator, upon written request of any participant or beneficiary, to furnish a copy of these same documents or else risk penalties for noncompliance in an action brought under § 502(c)(1).

[10] Despite § 402(a)'s singular reference to a plan "instrument," § 104(b)(2) makes clear that there may be multiple "documents" and "instruments" governing a plan. *See also* § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) ("a fiduciary shall discharge his duties . . . in accordance with the documents and instruments governing the plan"). Once a written plan amendment is effected it becomes such a governing document; even if it has not yet been incorporated into a restated plan document, it is available for inspection under § 104(b)(2).

required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." Conference Report at 297.

Section 402(b)(3) does not add significantly to the protection afforded participants under § 402(a). To be sure, some disclosure function may be served by spelling out in the plan instrument exactly what steps a sponsor must follow in order to amend a plan and alerting participants who are searching for amendments that have not yet been incorporated into written plan instruments, SPDs or SMMs exactly what form the written amendment took. The benefit of such disclosure is slight, if any, since under § 104(b)(2) the participant can already examine the written plan terms, including the amendment. Moreover, the details of how a corporation goes about amending a plan is not information which participants are likely to find useful. The lower courts have consistently held that employers, even if they otherwise occupy fiduciary positions in the administration of plans, do not act as fiduciaries when they amend a plan; rather, like the settlor of a trust, they are free to design and amend plans in their own interests as long as the terms do not violate any other provisions of ERISA or other federal law.[11] Given the

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[11] *See, e.g., Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994) ("an employer that decides to terminate, amend, or renegotiate a plan does not act as a fiduciary, and thus cannot violate its fiduciary duty, provided that . . . the amendment does not otherwise violate ERISA or the express terms of the plan," citing *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160-61 (3d Cir. 1990) (emphasis omitted)); *Musto v. American Gen. Corp.*, 861 F.2d 897, 912 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Amato v. Western Union Int'l, Inc.*, 773 F.2d

lack of a fiduciary-beneficiary relationship arising from the plan amendment process, there is no obvious reason why plan participants would want to know the details of an amendment procedure in which they play no part, as long as they know the result.

Indeed, the conclusion that participants do not need to know the details of a plan's amendment process was shared by the drafters of the statutory and regulatory disclosure requirements. Section 104(b) imposes a requirement on a plan administrator to prepare and distribute both a plan description and an SPD.[12] Notably, none of the information required by the statute to be disclosed in these documents relates to a plan's amendment procedure. Likewise, although the implementing regulation promulgated by the Department of Labor provides for even greater and more detailed types of disclosure, the information described in § 402(b)(3) relating to the plan amendment procedure is not among the items required to be disclosed. *See* 29 C.F.R. § 2520.102-3.

1402, 1416-17 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986).

[12] Section 102(b) contemplates the preparation of a plan description and a summary plan description containing identical information. Both documents are required to be filed with the Secretary of Labor (*see* §§ 104(a)(1)(B), (C)), but only the SPD is distributed to participants (*see* § 104(b)(1)). Recognizing the substantial duplication between the plan description and SPD, the Department of Labor has granted regulatory relief which permits both requirements to be satisfied by a single document, which is generally referred to as an SPD. *See* 29 C.F.R. § 2520.104a-2.

Given the absence of express disclosure requirements relating to § 402(b)(3), it is not surprising that model plan documents widely used by employee benefit practitioners, including prototype plan documents published by the Internal Revenue Service, contain amendment language essentially identical to that in the Curtiss-Wright plan Constitution.[13]

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[13] *See* Pet. at 8-9; Amicus Brief of the National Union Fire Insurance Company of Pittsburgh, PA in Support of the Petitioner at 9. Likewise, numerous judicial decisions have involved amendments of plans which contain similar language without suggesting that this language did not satisfy § 402(b)(3). *See, e.g., Gable v. Sweetheart Cup Co.*, 1994 U.S. App. LEXIS 25008, *5 (4th Cir. Sept. 13, 1994) ("Maryland Cup Corporation reserves the right to modify, change or terminate the medical coverage for retirees at any time in the future"); *Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133, 135 (6th Cir. 1993) ("the Company reserves the right to modify, suspend or terminate the Plan, at any time and for any reason"); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 933 (5th Cir.) ("[t]he Company reserves the right to alter, amend, delete, cancel or otherwise changes the plan or any of the provisions of the plan at anytime [sic]"), *cert. denied*, 114 S. Ct. 196 (1993); *Musto v. American Gen. Corp.*, 861 F.2d at 903 ("the Company does, as it always has, reserve the right to change the Plan and, if necessary, discontinue it"); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 490 (2d Cir. 1988) ("[t]he Company reserves the right at any time to change or discontinue this [plan]"); *In re White Farm Equipment Co.*, 788 F.2d 1186, 1189 (6th Cir. 1986) ("the Company does reserve the right to change the plans, and, if necessary, discontinue them"); *Amato v. Western Union Int'l, Inc.*, 773 F.2d at 1418 ("the Company does reserve the right to change or even terminate the Plan"); *In re Unisys Corp. Retiree Medical Benefits ERISA Litig.*, 18 Employee Benefits Cas. (BNA) 1257, 1274 (E.D. Pa. 1994) ("[t]he Company reserves the right to amend or terminate this Plan at any time in its sole discre-

Thus, the language used by Curtiss-Wright does not represent some unique instance of careless plan drafting but is instead a formulation of the amendment power that is commonly in use throughout the country.

The fact that plan amendments are so common itself suggests two other purposes for § 402(b)(3), both of which were served by Curtiss-Wright's language. First, the presence of such language in a plan document at least alerts participants to the possibility that an amendment can be made by "the Company," thus simultaneously warning them, in the case of welfare benefits, that those benefits are not vested and alerting them that they may wish to examine all plan documents in order to determine their current rights with certainty. Second, it ensures that the plan sponsor has retained, unless it chooses not to do so, the power to make amendments to the plan.

As this Court has noted, ERISA "abounds with the language and terminology of trust law," *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), and many

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tion"); *Bongiorno v. Associates in Adolescent Psychiatry*, 17 Employee Benefits Cas. (BNA) 1847, 1848 (N.D. Ill. 1993) ("[t]he corporation reserves the right to change any policy or benefit"); *Carroll v. Primerica Financial Servs. Ins. Marketing*, 811 F. Supp. 1558, 1560-61 (N.D. Ga. 1992) ("[t]he Corporation reserves the right to modify, revoke, suspend, terminate, or change any or all policies and procedures, in whole or in part, at any time, with or without notice"); *In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1187 (S.D. Tex. 1991) ("[t]he Company reserves the right to modify or amend the Plan, in whole or in part"), *aff'd sub nom. Borst v. Chevron Corp.*, 1994 U.S. App. LEXIS 19473 (5th Cir. Oct. 21, 1994).

ERISA provisions are drawn from trust law concepts. *Id.*; *see also Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570-71 (1985). Section 402(b)(3) is one of those provisions. At trust law, a settlor of a trust has power to modify the trust only to the extent that power is reserved in the trust instrument. *See* Restatement (Second) of Trusts § 331(1) (1959). Section 402(b)(3) requires a specification of that amendment power and of any limits placed on that power.[14] The twenty years since ERISA's enactment have demonstrated the wisdom of retaining amendment flexibility as employers have scrambled to amend their plans to comply with waves of new legislation[15] and to adjust to economic forces such as the

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[14] Indeed, although the legislative history of § 402(b)(3) is scant, it also suggests a Congressional concern that flexibility to amend be preserved. The House version of the bill that went into Conference and became ERISA gave a plan administrator authority to amend a plan "(except with respect to contribution rates) where such an amendment is necessary to meet the requirements of this title or where such an amendment is necessary to protect the interests of the participants." H.R. 2 (as passed in House), 93d Cong., 2d Sess. § 111(a)(1) *reprinted in* 3 Legislative History 3898, 3947-48. Although the concept of having a fiduciary make amendments disappeared in the final bill, § 402(b)(3) evidences the concern to preserve amendment power.

[15] *See* Human Resources Div., U.S. General Accounting Office, *Retiree Health Plans: Health Benefits Not Secure Under Employer-Based System* 5 (93-125) (1993) (hereinafter "1993 GAO Report"); *see also ERISA: The Law and the Code* v-ix (Paul F. Albergo ed., 1994).

national explosion in health care costs.[16] A principal purpose served by § 402(b)(3) under these circumstances has been the inclusion in plans of provisions reserving amendment rights on behalf of plan sponsors and disclosing to participants that amendments may occur.[17]

In short, a holding that Curtiss-Wright's amendment language was in compliance with § 402(b)(3) would give meaning to the provision by recognizing the purposes it serves, not render it meaningless. The conclusion reached by the court below, in contrast, is not required by the language of § 402(b)(3), does not serve the certainty purpose identified by the court, and renders unlawful plan provisions that have been widely used and endorsed by the Internal Revenue Service and treated as effective by numerous other courts since the enactment of ERISA in 1974. Accordingly, it should be reversed by this Court.

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[16] *See* 1993 GAO Report at 12-16; *see also* Human Resources Div., U.S. General Accounting Office, *Employer-Based Health Insurance: High Costs, Wide Variation Threaten System* 4 (92-125) (1992).

[17] "In general, employers may make changes in their plans as long as they have reserved the right to do so. According to the benefit consultants we contacted, virtually all employers have reserved their right, in some fashion, to change their health benefit plans." 1993 GAO Report at 6.

II. Assuming *Arguendo* That § 402(b)(3) Was Violated, the Remedy Chosen by the Court Below Was Not Warranted

Assuming *arguendo* that the Court of Appeals was correct in determining that a violation of § 402(b)(3) occurred, the remedy awarded -- a declaration that the plan amendment promulgated by Curtiss-Wright was unenforceable and, consequently, that plaintiffs were entitled to benefits under the pre-amendment plan -- was unwarranted for several reasons.

First, as discussed *supra* at p. 7, the real criticism made by the Court of Appeals was not that Curtiss-Wright lacked some "procedure", *i.e.*, "manner of proceeding" to amend its plan document; a method did exist by which the amendment was accomplished. Rather, the perceived defect was that this procedure was not spelled out to the court's satisfaction in the written instrument required under § 402(a). It is difficult to imagine that an award of benefits would be the appropriate remedy for the failure of a plan to comply with any of the other provisions required or permitted by other subsections of § 402(b), *i.e.*, a funding policy (§ 402(b)(1)), an allocation of fiduciary responsibilities (§ 402(b)(2)), or a specification of the basis of payments made to a plan (§ 402(b)(4)). The same should be true as to a violation of the remaining subsection, § 402(b)(3).

Even if the violation of § 402(b)(3) is characterized as the failure to have a "procedure," not merely to set forth the procedure in writing, an award of benefits is still not the appropriate remedy. Courts have consistently refused to award substantive remedies for "procedural" violations,

especially where no substantive harm or detrimental reliance had resulted from the procedural failure.[18] Here, there is no claim that a failure to have an amendment procedure itself caused any harm to participants; if the procedure had fully complied with the court's conception of § 402(b)(3), the participants would have been in no better, or even different, situation than resulted from the actual amendment process used by Curtiss-Wright. The 1983 amendment would still have eliminated their benefits.

Moreover, the award of a substantive remedy cannot be justified by the statutory purpose of § 402(b)(3) as identified by the Court of Appeals. Far from producing certainty, the lower court's remedy would presage a litigator's dream and a practical nightmare for all of the parties connected to employee benefit plans. Participants and beneficiaries could never rely on a plan's terms as describing their benefit entitlements. Given the frequency with which employee benefit plans have been amended in response to statutory changes and other concerns (*see supra* notes 15, 16), they would be foolish to do so.

Plan sponsors could presumably deal prospectively with the decision below by formalizing and particularizing their

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[18] *See, e.g., Lewandowski v. Occidental Chemical Corp.*, 986 F.2d 1006, 1008-09 (6th Cir. 1993); *Kreutzer v. A.O. Smith Corp.*, 951 F.2d 739, 743 (7th Cir. 1992); *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 949 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990); *Simmons v. Diamond Shamrock Corp.*, 844 F.2d 517, 524-25 (8th Cir. 1988); *Kleinhans v. Lisle Savings Profit Sharing Trust*, 810 F.2d 618, 621-22 (7th Cir. 1987).

plan amendment procedures.[19] They could not, however, fix the past; even if a plan's amendment procedure were immediately brought into conformance with the lower court's interpretation of § 402(b)(3) and a plan were immediately restated to ratify all past amendments, benefit claims arising from events prior to such restatement would be determined under the pre-restated plan. Thus, the enforceability of many existing plan terms is placed in doubt by the decision below and can only be resolved through the litigation which, given that billions of dollars of benefits are potentially at stake, would inevitably ensue. The unanticipated costs of providing past benefits which employers thought had been modified or eliminated by plan amendments now deemed to be ineffective under the decision below would be staggering, not to mention the concomitant legal and administrative expenses to be suffered by corporations, large and small.

Moreover, by holding that Curtiss-Wright's amendment language was inadequate to effect an amendment, the decision below provides an obvious litigation route to avoid Congress' intent that welfare benefits do not vest. *See* § 201(1), 29 U.S.C. § 1051(1) (ERISA's vesting requirements do not apply to employee welfare benefit plans). Congress declined to require vesting of welfare benefits,

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[19] A large portion of the employee benefit plan universe, however, involves insured plans in which the plan sponsor's role in amending the plan is usually limited. Typically, the insurance policy itself as issued by the insurer is the only plan instrument, and the plan is amended via a written policy endorsement from the insurer which is accepted by the employer's payment of a premium. Exactly how these plans would cope with the decision below is another mystery that would only be resolvable through litigation.

recognizing that this requirement "would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 60, *reprinted in* 2 Legislative History 3180 *and in* 1974 U.S. Code Cong. & Admin. News 4670, 4726. Instead, Congress intended employers to be free to create, modify, or terminate the terms and conditions of welfare benefit plans as inflation, changes in medical practice and technology, and the costs of treatment dictate. *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d at 492; *see also Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985) (ERISA "does not regulate the substantive content of welfare-benefit plans"). Lower courts have uniformly recognized this principle, refusing to vest welfare benefits in the absence of an intent to do so. *McGann v. H. & H. Music Co.*, 946 F.2d 401, 405-07 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d at 1160.

Also at risk from the decision below, but for different reasons, would be the fiduciaries charged with plan administration who owe statutory duties to act in accordance with plan terms (*see* § 404(a)(1)(D)) but also to act "solely in the interest" of plan participants and beneficiaries (*see* § 404(a)(1)). Like the other interested parties, they too would need to examine more closely the procedural propriety of past plan amendments and perhaps take affirmative steps

to establish the validity of plan provisions through actions for declaratory relief.[20]

These effects on plan parties are not the product of a doomsday scenario but are readily predictable. As litigation explodes and benefit costs surge, employers would, as they have in the past, react by cutting benefits and their attendant costs in other respects.[21] Thus, while past participants and beneficiaries might gain unanticipated benefits from the decision below, future participants and beneficiaries would pay for those benefits, as well as their attendant litigation and other expenses. Certainty in plan administration and elimination of unnecessary expenses that discourage employers from maintaining plans -- two recognized objectives of the Congress that enacted ERISA -- would be among the casualties.

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[20] This course of action itself is not without uncertainty. Although, as this Court noted in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108 (1989), § 502(a)(1)(B) of ERISA allows a participant or beneficiary to sue "to obtain a declaratory judgment of future entitlement to benefits under the provisions of the plan contract," a number of lower courts have held that ERISA does not authorize a cause of action by a fiduciary for such relief. *See Transamerica Occidental Life Ins. Co. v. DiGregorio*, 811 F.2d 1249, 1252-53 (9th Cir. 1987); *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1523 (11th Cir. 1987) ("Gulf Life's declaratory judgment action simply is unnecessary to further the statute's purpose"); *Reynolds v. Stahr*, 758 F. Supp. 1276, 1280-81 (W.D. Wis. 1991).

[21] *See* 1993 GAO Report at 3 & App. II.

The court below also justified its remedy by a perceived need to deter violations of § 402(b)(3). Thus, the court stated that not to award a substantive remedy "would place those who violate § 402(b)(3) by including no procedure for amendment in a plan in a better position than those who comply with that requirement and would thereby discourage employers from complying with § 402(b)(3)." (Pet. App. 11a.) If, however, deterrence is the remedial goal, it is ill-served by an award of benefits in this case since there is no need to deter an employer which adopted a plan amendment provision endorsed by the IRS and commonly used by other employers.

Moreover, the court's distinction between non-complying employers who require a deterrence remedy and complying employers who do not is a misleading one. Rather, as the court's discussion makes clear, its comparison is between employers which do not have an amendment procedure that satisfies § 402(b)(3) and employers which have a satisfactory procedure but then fail to comply with it. These latter employers have not violated § 402(b)(3) but instead have violated the terms of the plan. Thus, the distinction in remedy identified by the Court of Appeals relates to non-complying employers in two different circumstances. As discussed below, however, that distinction is a logical one, well-recognized in trust law.

Under trust law, a settlor has the power to modify the trust if and to the extent that he reserved such a power by the terms of the trust. If the settlor does not by the terms of the trust reserve a power to alter or amend or modify it, he has no power to do so. Restatement (Second) of Trusts § 331.

The settlor may reserve a power to alter the trust in any way he sees fit, or he may reserve a power to modify it only in some particular way. If the settlor reserved the power to modify the trust using only a particular method, or placed any other limitation on the right to amend, those restrictions must be obeyed; any attempt to modify the trust which exceeds the limitations placed on the amendment power by the terms of the trust will be deemed a nullity. *See id.* cmt. d. This rule has been carried over into ERISA by decisions holding that amendments made in violation of plan terms are ineffective. *See Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246, 255 (7th Cir. 1991); *Frank v. Colt Indus., Inc.*, 910 F.2d 90, 98 (3d Cir. 1990).

This case, however, does not involve a violation of limits placed on a plan's amendment procedure by the terms of the plan itself. At trust law, where the settlor reserved a power to amend and placed no limits on that power, the power is considered unlimited and may be exercised by any method which sufficiently manifests an intention to modify the trust. *See* Restatement (Second) of Trusts § 331 cmt. c. This rule too has been recognized in ERISA cases in which courts have upheld amendments clearly intended by a plan sponsor but made to plans which, much more clearly than in this case, did not comply with § 402(b)(3) because they contained no reservation of an amendment power whatsoever. *See Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 949 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990); *Biggers v. Wittek Indus., Inc.*, 4 F.3d 291, 296 (4th Cir. 1993).

The rules established by trust law and the decisions in *Adams* and *Biggers*, which conflict with the decision of the

Court of Appeals in this case, make sense. A plan provision that places limits on the amendment power must be followed. Where a plan contains no such limits, however, the sponsor's intent to amend should be given effect, especially where any procedural violation of § 402(b)(3) had not caused substantive harm to participants. The sponsor in that case is not receiving "better" treatment than in the former case; different remedies are merely being tailored to different situations. By ignoring these differences and invalidating the Curtiss-Wright amendment, the Court of Appeals erred, and its decision should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals to the extent it holds Curtiss-Wright liable for plaintiffs' benefits.

Respectfully submitted,

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